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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 239

R. LEO SCHWARZ,

Petitioner,

vs.

VICTOR WEST,

Respondent.

PETITION FOR A WRIT OF CERTIORARI AND ARGUMENT IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. .....

R. LEO SCHWARZ,

Petitioner,

vs.

VICTOR WEST,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, R. Leo Schwarz, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review its judgment of June 16, 1950, affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division, to the end that said judgment may be reversed.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (T. 175) is reported in 182 F. 2d .....

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 16, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

THE QUESTIONS PRESENTED.

The chief question is: whether the district courts of the United States have jurisdiction to hear treble damage cases arising under the Housing and Rent Act of 1947, as amended and extended?

If certiorari is granted the petitioner asks leave to present the following additional questions:

1. Whether the Court of Appeals is required by law to determine whether the plaintiff has met the burden of proof?

2. Whether the Rules of Civil Procedure preclude the Court of Appeals from determining whether the judgment is in accord with the weight of the evidence?

3. Whether an alleged plan of action or custom is admissible in evidence; and if such evidence is admitted, should the trial court then admit evidence of actual occurrences that show there is no such plan or custom?

4. Whether a deposition can be considered by the trial court though not in compliance with the Rules of Civil Procedure?

STATUTES INVOLVED.

The pertinent parts of the statutory provisions here involved are as follows:

ORIGINAL PRICE CONTROL STATUTE:

Section 205 (c) of the Emergency Price Control Act of 1942, approved January 30, 1942 (56 Stat. 23, 33-34, 50 U. S. C., app. sec. 925), reads, in part, as follows:

> "The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act."

Section 205 (e) of said Act reads, in part, as follows:

> "* * * Any suit or action under this subsection may be brought in any court of competent jurisdiction. * * *"

PRESENT PRICE CONTROL STATUTE:

Section 205 of the Housing and Rent Act of 1947, as amended, (61 Stat. 193, 199, 50 U. S. C., appendix, sec. 1895) reads, in part, as follows:

> "Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction * * *."

JUDICIAL CODE:

The Judicial Code (Title 28, Section 1331; 62 Stat. 869, 930, effective September 1, 1948) reads as follows:

> "The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds $3,000, exclusive of interest and costs, and

arises under the Constitution, laws, or treaties of the United States."

RULES OF CIVIL PROCEDURE.

The pertinent parts of the rules applicable here read as follows:

Rule 30 (a):

"The notice shall state the time and place for taking the deposition and the name and address of each person to be examined."

Rule 30 (f) (1):

"The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness."

Rule 30 (f) (3):

"The party taking the deposition shall give prompt notice of its filing to all other parties."

Rule 52:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Rule 61:

"The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

STATEMENT OF THE CASE.

This is an action to recover treble damages for the alleged collection of a "bonus" under the provisions of Section 205 of the Housing and Rent Act of 1947, as amended and extended. The action was filed in the District Court of the United States, Northern District of Illinois, Eastern Division. (T. 2.) At the commencement of the trial the defendant made a motion to dismiss the case for lack of jurisdiction and the motion was overruled. (T. 12, 34-35.)

In connection with the additional questions to be presented (subject to this Court granting permission) the following facts are pertinent:

1. At the time of the payment of the alleged "bonus" there were present the parties to the suit, the janitor of the building and his wife. The plaintiff testified that he paid the money, the defendant denied this, the janitor and his wife testified they were in the adjoining room, could see what was going on, and saw no money passed.

2. A summary of the entire evidence is as follows: the plaintiff stated he met the defendant at his office, tendered him a check for $2,000.00 but it was not accepted—this was denied by the defendant; the plaintiff stated he went to his safety deposit box and withdrew the money therefrom; he did not keep the check that was tendered; the money was counted in the presence of his wife and her sister; he then went to the apartment of the building with his wife and her sister but he alone entered the janitor's apartment; the parties, the janitor and his wife were in the apartment at the time. There was no evidence of any kind impeaching the testimony of the janitor and his wife.

3. In connection with additional point three the following facts are pertinent: at the trial the plaintiff offered testimony of alleged statements for the payment of a "bonus" for another apartment in the building, both at the time of the original negotiations and many months later, also the testimony of one Milton Kahn, an attorney, who stated that many months prior to the time involved in the case he sought to rent an apartment in the building and was asked for a "bonus". The defendant sought to meet this evidence with the testimony of tenants who had rented apartments in the building since rent control, but the evidence was refused by the trial court.

4. At the trial a deposition was read in evidence which did not conform with the Rules of Civil Procedure in the following respects: the notice of the taking of the deposition did not have the address of the witness, there was no notice given of the filing of the document, and the notary failed to certify that the deposition was correct.

SPECIFICATIONS OF ERRORS.

The Court of Appeals erred:

1. In holding that the United States District Court had jurisdiction to hear this case.

2. In failing to hold that the plaintiff had not met the burden of proof.

3. In failing to examine the evidence to determine whether it was in accord with the weight thereof, and, in effect, holding that the Federal Rules of Civil Procedure preclude such examination.

4. In holding that evidence of general conduct is admissible and that evidence in rebuttal is not admissible.

5. In holding that a deposition may be considered even though it does not comply with the requirements of the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below in this case is in direct conflict with the decision in *Fields* v. *Washington,* 173 F. 2d 701 (C. A. 3, April 1, 1949), written by Judge Maris and concurred in by Judges O'Connell and Kalodner. The court below followed two prior decisions of different divisions of the same court: *Adler* v. *Northern Hotel Co.,* 175 F. 2d 619 (C. A. 7, June 21, 1949), opinions written by Judges Kerner and Duffy, with a dissent by Judge (now Justice) Minton; and *Meyercheck* v. *Givens,* 180 F. 2d 221 (C. A. 7, February 8, 1950, Judges Major, Finnegan and Lindley).

The main basis for the decision of the court below was the case of *Adler* v. *Northern Hotel Co.,* in which the members of the court did not agree and in which Justice Minton, now of this Court, wrote a strong dissent.

The main basis of the decision in *Meyercheck* v. *Givens* was also the *Adler* case, which was followed by the court though admitting that there was room for argument as to the correctness of the *Adler* case.

The direct conflict between the decision in the *Fields* case and the case below (and its predecessors described above) arises because the court in the *Fields* case held that the provisions of the Housing and Rent Act of 1947, as amended, did not grant jurisdiction to the district court by the following words "Suit to recover such amount may be brought in any Federal, State or Territorial court of competent jurisdiction." On the other hand, the Court of

Appeals in the *Adler* case (and those that followed it in the same Circuit) and the instant case held that the 1947 Act did grant jurisdiction to the District Court.

As a result of this direct conflict presented by these cases, the district courts have been floundering in a sea of confusion with the majority of the reported decisions following the rule that the Housing and Rent Act of 1947, as amended, did not grant jurisdiction to the district courts.

In the following reported cases the trial courts held that the said Act did grant jurisdiction:

Sampson v. *Thomas,* 76 F. Supp. 691, 693 (E. D. Mich., S. D.).

Adams v. *Backus,* 81 F. Supp. 643 (D. Neb., Lincoln Div.).

Albright v. *Nelson,* 87 F. Supp. 737 (D. Minn.).

In the following reported cases the trial courts held that said 1947 Act did not grant jurisdiction:

McRae v. *Johnson,* 84 Supp. 220, 221-222 (D. Md.).

Morazan v. *Hausmaninger,* 85 F. Supp. 57 (E. D. Pa.).

Hershenrader v. *Campbell,* 85 F. Supp. 75 (W. D. Ky.).

Frisch v. *Lopez,* 87 F. Supp. 544, 545 (E. D. Pa.).

Burns v. *Bishop,* 88 F. Supp. 2 (W. D. Ark.).

Temmerman v. *Scafidi,* 88 F. Supp. 527 (N. D. Cal. S. D.).

Aram v. *Hazelwood Apartments Co.,* 89 F. Supp. 836 (D. C. Mich.).

The seriousness of the confusion is emphasized in the recent case of *Aram* v. *Hazelwood Apartments Co.,* 89 F. Supp. 836 (D. C. Mich.), decided by Judge Thornton of the United States District Court, E. Division of Michigan.

on March 31, 1950, when he stated that conjecture has been rampant by the courts as to the intention of Congress in this matter.

While most of the cases on this question have been decided on the basis that they did not involve more than $3,000.00, the fundamental rule announced was that the 1947 Act did not, of itself, confer jurisdiction on the district courts; otherwise, the amount involved would not be necessary to discuss.

If the 1947 Act does not confer jurisdiction it is necessary to consult the general jurisdiction statute. In this case there was no diversity of citizenship; therefore, under the general statute there must be involved more than $3,000.00 *and* a federal question.

2. The decision below (and the cases preceding it in the same circuit) are in conflict with the general rules that have been announced in this Court. In *Porter* v. *Lee,* 328 U. S. 246, 250, this court held that Section 205 (c) of the original price control act conferred jurisdiction on state courts to hear treble damage cases, and by inference that it also granted jurisdiction to the Federal courts because of the use of the word "concurrent" in the statute. This section of the original was not repeated or carried over to the 1947 Act. In *Missouri ex rel. St. Louis B. & M. R. Co* v. *Taylor,* 266 U. S. 200, 208, this court stated the general rule that when Congress creates a cause of action it can provide that the right can be enforced only in Federal courts, or in a Federal court where applicable, or in state courts when its ordinary jurisdiction (as prescribed by local law) is appropriate. The decision of the court below is in conflict with this general rule in that Congress has stated that the suit may be filed in any court of "competent jurisdiction" thereby indicating that the prescribed jurisdiction of the court must be considered. In *Mondou* v. *New York, N. H. & H. R. Co.,* 223 U. S. 1, 56,

this court, in construing an act of Congress which created a new right, observed that an amendment to said act presupposed that the courts where the cases were to be filed already possessed jurisdiction under some law. The statute here under consideration was also amended in a manner which indicates that the right is to be enforced in courts that already have the power to act by virtue of some other law.

3. This jurisdictional question is important primarily because of the fundamental legal principles involved. The Congress will undoubtedly be creating more rights in the future and this Court should announce the rule that is to be used when such statutes use the term "competent jurisdiction." The Congress, the courts and litigants should know whether a statute containing these words grants jurisdiction in itself or reference must be made to the Judicial Code. Furthermore, the development of international events indicates not only that rent control will continue for some time but that there will be an early reinstatement of total controls. In enacting such new controls the Congress will probably provide for a treble damage remedy; shall it use the words of the original Act or those of the present Act?

4. This Court, furthermore, in the exercise of its supervisory power, should decide this question in order that the district courts in cases still pending or to be filed may know whether they have jurisdiction to hear the cases. In 1949 there were 1,046 cases filed and by July 1, 1950 there had been 333 cases filed in the district courts.

The reasons why the decision of the court below is erroneous is discussed under Point I of the argument herein.

In granting certiorari in this case the Court should consider the following additional questions for the following reasons:

1. The court below held that if there is substantial evi-

dence in the record to sustain the judgment the decision of the trial court must be affirmed. Inferentially it held that it had no duty to consider whether the plaintiff had met the burden of proof. This is a departure from a well established legal principle that the plaintiff must prove his case with the burden of proof. The court below did not consider this point but merely searched the record for facts that might tend to support the judgment; this was error because it was not a matter of credibility of the evidence which, of course, is primarily the duty of the trial court to ascertain.

2. On appeal the petitioner urged the point that the judgment was against the manifest weight of the evidence. The Court of Appeals held that in view of Rule 52 (a) of the Rules of Civil Procedure it was not necessary to weigh the evidence when it said "at the risk of giving the impression of weighing the evidence, we have cited in considerable detail testimony given at the trial." This is the announcement of a general rule which may lead to serious results. It has been well established that a judgment must be based on the weight of the evidence. In a case where there is a conflict of the evidence the decision of the trial court is generally final because it had the opportunity to see the witnesses and is best able to judge the credibility of the witnesses. But where it is not a question of credibility but of weight of the evidence, the appellate tribunal must weigh the evidence rather than search the record for some evidence to sustain the judgment.

In the instant case, at the time of the payment of the alleged "bonus" there was present, in addition to the parties, the janitor of the building and his wife; the plaintiff testified he paid the money, the defendant denied this, and the other two (who were in the adjoining room and saw what was going on) testified they did not see any money

pass. There is other evidence of record that lends itself to more than one plausible conclusion and calls for a determination of its weight rather than its credibility; *e. g.*, the evidence that on a certain day the plaintiff visited his safety deposit box; does this prove he took $2,000 from the box?

3. The court below has difficulty in determining the admissibility of the evidence of the alleged "plan of action or custom" of the defendant to ask for bonuses when renting an apartment. It brushed off the matter by saying that the evidence was not necessary to support the findings of the trial court, and that the proffered testimony of the tenants renting apartments since rent control was not admissible because it was negative evidence. The members of the court below were not able to agree on this phase of the case, yet have announced a general rule that evidence of general conduct is admissible (without indicating that there are some necessary qualifications to this rule) and that evidence of specific acts cannot be admitted in rebuttal. In other words, the old adage "Actions speak louder than words" no longer applies. This court has never had an opportunity to express itself on this question; it is an important one because of the nature of the case. The instant case can be cited in support of a rule that is fraught with danger to the substantial rights of litigants and may mislead trial courts to a form of conduct that will not be conducive to the proper administration of justice. This court should consider this question so that it may announce the general rule that habit or general conduct is admissible if the acts are similar and close to the time of the occurrence at issue, and that once this is done acts of specific conduct of the same nature may be considered in rebuttal.

4. The deposition admitted in evidence was not in compliance with the Rules of Civil Procedure in the following respects: the address of the witness was not stated, there

was no notice of the filing of the deposition, and the notary did not certify to its correctness. The petitioner was substantially prejudiced in that he had no opportunity to investigate and prepare his cross-examination because he had no address of the witness; the witness was not present at any time or place where the petitioner was present so he had no opportunity to ascertain what the witness was going to say, who she was, etc.; manifestly, the sole reason for providing this information is so that the other party may be prepared at the time of the deposition. The giving of notice of the filing was to give the other party an opportunity to examine the deposition and take steps to have it corrected or quashed if not correct; the petitioner had no opportunity to do this. The notary's failure to certify to the correctness of the deposition raises the clear inference that it is not correct. The court below has announced a general rule that one can completely disregard the specific requirements of the Rules of Civil Procedure with impunity. This court will observe that there was no attempt to comply with the above requirements of the statute. The rules should be construed as a whole; when this is done it will be found that there must be a substantial compliance with the rules regarding depositions. This court should review this question so that the district courts may have a guide in the application of the Rules of Civil Procedure relative to depositions.

ARGUMENT.

I.

The District Court Had No Jurisdiction to Hear a Treble Damage Case Arising Under the Housing and Rent Act of 1947, as Amended and Extended, Unless in Compliance With the Requirements of the Judicial Code.

It is well established that a Federal district court is a court of limited jurisdiction; that one who seeks relief in one of said courts must point to the statute which grants jurisdiction; there is no presumption that the district court has jurisdiction (*Ex Parte Smith,* 95 U. S. 455, 456); and the burden is on the plaintiff to allege and show that the district court has jurisdiction. (*McNutt* v. *General Motors Acceptance Corporation,* 298 U. S. 178.) In the instant case the plaintiff stated in his complaint that jurisdiction was conferred by the Housing and Rent Act of 1947, as amended and extended (T. 2); consequently, if this Act does not grant jurisdiction the judgment is invalid and cannot stand.

The pertinent part of said 1947 Act reads as follows:

> "Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction * * *."

In view of the fact that the original price control law (Emergency Price Control Act of 1942, 56 Stat. 23, 33-34; 50 U. S. C., app. sec. 925), did grant jurisdiction to the district court, and many suits were filed thereunder, a comparison of the provisions has been made by most of the courts considering the matter. These provisions read as follows:

Section 205 (c):

"The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act."

Section 205 (e):

"Any suit or action under this subsection may be brought in any court of competent jurisdiction."

This major change (the elimination of sec. 205 (c)) was vital and indicated an intention on the part of the Congress to withdraw the grant made by the original price control act. When the statute was changed to read that the cause of action could be enforced in a court of "competent jurisdiction" it meant a court that already had jurisdiction of the parties and of the subject matter, not that the statute was making any particular court one of competent jurisdiction. In other words, the jurisdiction that was conferred on a court was to be determined by some other statute regarding the particular court. If it was intended that the 1947 statute was conferring jurisdiction on all courts, the Congress could have stopped at the word "court" because the words "of competent jurisdiction" would be surplusage and would have retained the words "the district courts shall have jurisdiction" of the original act which clearly grant jurisdiction.

The court will also note that the 1947 Act for the first time contained the words "liquidated damages" in describing the money to be recovered as damages. This was intended to indicate that the statute did not create a penalty and thereby was not enforceable in some state courts because of prior decisions to the effect that penalties imposed by statutes of other sovereignties could not be imposed by the local court.

Furthermore, it cannot be assumed that the Congress would place unnecessary words in a statute. This court

has clearly stated that when a new right is created by a Federal statute, but no remedy is provided, the local and Federal courts have concurrent jurisdiction. (*Missouri ex rel. St. Louis B. & M. R. Co.* v. *Taylor*, 266 U. S. 200, 208.) As a matter of fact, the Congress may even withhold jurisdiction from local courts over rights of action created by its statutes. (*Bowles* v. *Willingham*, 321 U. S. 503, 512.)

The term "competent jurisdiction" has been defined by the courts on many occasions and has a well established meaning, *i. e.*, a court which has the power conferred on it by law to hear and determine a particular case. By the very nature of the words no grant of power is given but reference must be made elsewhere. When used in the 1942 act (Section 205 e) it was necessary to refer to another part of that act (Section 205 c) to ascertain. When this section 205 (c) was dropped from the 1947 Act it was not done accidentally; this is indicated by the insertion of the term "liquidated damages" in the section and the addition of the words "Federal, State, or Territorial." These changes were designed to eliminate the refusal of some local courts to hear treble damage cases on the ground that they involved the recovery of a penalty. After the experience of five years the Congress very likely decided not to have the District Court act like justices of the peace courts, as so aptly stated by Judge (now Justice) Minton in the *Adler* case.

The Congress had the power, and was acting with wisdom and discretion when it decided to have the local courts act within the realm of their jurisdiction and that the Federal Courts act within their traditional sphere.

The reasoning of the court in *Adler* v. *Northern Hotel Co.*, 175 F. 2d 619, is not sound. The court's decision is based on the following reasoning: the Act is an emergency measure, the enforcement provision is remedial, therefore to be liberally construed to permit the greatest freedom

for the filing of such actions; and the term "competent jurisdiction" is not designed to limit the jurisdiction of the Federal District Courts. The authors of the majority opinions failed to consider that there is no presumption that the district court has jurisdiction (*Ex Parte Smith,* 94 U. S. 455), that the burden is on the plaintiff to show that the court has jurisdiction, and that the vital changes made in the statute in 1947 show an intention on the part of Congress to change the existing law.

On the other hand, the reasoning in the case of *Fields* v. *Washington,* 173 F. 2d 701, and the dissenting opinion of Judge Minton (now Justice Minton) in the *Adler* case is sound. This decision and dissent is based on the following reasoning: the 1947 Act does not contain a general grant of jurisdiction as in the 1942 Act, that a comparison of the two statutes clearly shows they are not intended to mean the same thing; that because jurisdiction is not granted in all cases in the 1947 Act it is necessary to examine other statutes.

Consequently, the decision of the *Adler* case, and of the court below, is in error on the point that the 1947 Act confers jurisdiction on the district courts to hear treble damage cases.

The sole remaining question is: whether the district court had jurisdiction of the case under the provisions of the Judicial Code (28 U. S. C., sec. 1331, 62 Stat. 869, 930) which reads as follows (although not relied on by plaintiff in this complaint):

> "The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds $3,000, exclusive of interest and costs, *and* arises under the Constitution, laws, or treaties of the United States." (Italics added.)

The alleged "bonus" was $2,000.00; but even if it is assumed that treble the amount shall be used as the juris-

dictional amount, this case lacks the second element, *i. e.*, the requisite federal question.

It has been well established that the mere fact that a claimed right flows from a Federal statute is not, for that reason alone, one arising under the laws of the United States; in order to be within that term the case must involve a dispute or controversy in respect of the validity, construction or effect of a law of the United States upon which the result of the case depends. (*Shulthis* v. *McDougal*, 225 U. S. 561, 569; *First National Bank* v. *Williams*, 252 U. S. 504, 512.)

The conclusion is inescapable that the District Court did not have jurisdiction in this case.

II.

The Court of Appeals Is Required by Law to Determine Whether the Plaintiff Has Met the Burden of Proof.

The Court below refused to consider whether the plaintiff met the burden of proof, on the ground that if there is substantial evidence to sustain the judgment this question is immaterial.

The act relied upon in this case as a basis for recovery is an illegal act and a violation of a Federal statute. Therefore, there are certain rules applicable which are not generally considered in a civil case. At the outset we find the rule that "there is a presumption of legality of acts and transactions, as against illegality." (Cyclopedia of Federal Procedure, 2d ed., 1943, Vol. 7, par. 3170, p. 195.) The plaintiff must overcome this presumption by clear evidence (20 Am. Juris. 146) because the alleged act is a violation of law (20 Am. Juris. 149). Furthermore, the plaintiff is seeking to enforce a statutory right and is bound by following the general rule set forth in 20 Am. Juris. 140:

> "It is incumbent upon one claiming a peculiar right, not common to all, given by statute, which is given only when a prescribed state of facts exists to show the existence of that state of facts."

And there is also the rule that fraud is never presumed. (*National Shawmut Bank* v. *Topas,* 60 F. 2d 467; 20 Am. Juris. 146.)

This court held in *Harrison* v. *Vose,* 50 U. S. 372, 9 How. 372, an action to recover a debt imposed by a statute of the United States, that "where penalties are to be recovered greater fulness of evidence is necessary to make out such a case as the law contemplates." This rule is applicable here. And it has been held in numerous treble damage cases that the burden of proof is on the plaintiff. [*Porter* v. *Kenmore Mfg. Co.,* 161 F. 2d 123 (C. A. 7); *Porter* v. *Leventhal,* 160 F. 2d 52, 59 (C. A. 7); *Porter* v. *Rabinowitz,* 159 F. 2d 512, 516 (C. A. 5); *Fleming* v. *Ashbaugh,* 158 F. 2d 826 (C. A. 9); *Goddard* v. *Maddox,* 69 F. Supp. 1011 (D. C., N. D. Ga.).]

The collateral facts presented to the trial court by the plaintiff are denied by defendant when he was present and in a position to know. Other collateral facts are either substantiated by the plaintiff's wife or her sister, all of whom may be considered as interested witnesses. All other collateral facts allegedly substantiating the plaintiff are subject to more than one inference; such as, for example, the evidence that he visited his safety deposit box on a particular day; this does not substantiate his testimony that he took the money out of the safety deposit box; it merely tends to prove that he visited the vault that day.

As to the alleged payment of the money, which is the only question in this case, the plaintiff did not meet the burden of proof. He testified that he paid the money; this is denied by the plaintiff. At this point the evi-

dence, at best is evenly balanced. But then we have the testimony of the janitor and his wife who were in the adjoining room and saw everything; they said they did not see any money passed. (T. 80-91.) The plaintiff testified that the money was counted by the defendant (T. 50); inasmuch as he claims he gave the defendant twenty one hundred dollar bills, it is hard to see how this could have happened without the janitor and his wife failing to see the money.

In *Goddard* v. *Maddox,* 69 F. Supp. 1011 (D. C., N. D. Ga.), a treble damage case based on the alleged sale of an automobile at over-ceiling price, the plaintiff claimed he turned over his used car and received no payment for it. The defendant testified he paid the plaintiff for the car in cash; one of his employees corroborated this cash payment. The court held (p. 1012) that the burden of proof was on the plaintiff; that the evidence did not preponderate either way; therefore, plaintiff was not entitled to recover.

The foregoing case was decided in accordance with well established principles of law. A positive statement met by a denial does not meet the burden of proof. (*Cowen* v. *Houck Mfg. Co.,* 249 F. 285 (C. A. 2); *Broughton* v. *Smart,* 59 Ill. 440, 442; *Sigmund* v. *Strackbein,* 140 Ill. App. 454, 457). The testimony of the janitor and his wife overbalance the affirmative testimony of the plaintiff; their testimony cannot be disregarded because it was not impeached, and there is no reason for refusing it credence. [*Rodi* v. *Dean,* 138 F. 2d 309, 310-311 (C. A. 7); *Bijur* v. *Bendix,* 285 F. 974, 975 (C. A., Dist. of Col.).]

The fact that the plaintiff may have practical difficulties in this type of case makes no difference [*Acker* v. *Schulte,* 74 F. Supp. 683 (D. C., S. D. N. Y.)]; and the impossibility of proving one's case does not change the rules of evidence. [*Cross Co.* v. *Simmons,* 96 F. 2d 482,

486 (C. A. 8); *U. S.* v. *Canadian American Spirits,* 75 F. Supp. 730 (D. C., N. J.).]

III.

The Court of Appeals Is Required by Law to Examine the Evidence and Determine Whether It Is in Accord With the Weight Thereof.

The court below held that if there is substantial evidence in the record to sustain the judgment, it cannot weigh the evidence; it cited Rule 52 (a) of the Federal Rules of Civil Proceedure in support of this conclusion.

Said Rule provides, in part, as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

This rule merely is another way of stating the well established rule that where the evidence is in conflict the finding of the trial court is conclusive because it was in a better position to judge the credibility of the witnesses. The Rule does not modify the common law rule that the finding must be in accordance with the weight of the evidence.

While in many respects the evidence is in conflict especially when the testimony of the parties themselves is considered, the evidence at the time of the alleged payment of the "bonus" greatly preponderates in favor of the defendant. At that time there was present the parties, the janitor of the building, and the janitor's wife. The plaintiff testified that he paid the "bonus," the defendant denied this, and the janitor and his wife testified they saw no money pass.

As stated in *Feldman* v. *Kern,* 247 Ill. App. 48, 51:

> "It is not a question of credibility. It is a question of weighing the evidence, and in so doing plaintiff fails to meet the basic legal requirement that he must prove his case by a preponderance or greater weight of the evidence."

It is well established that if a judgment is against the manifest weight of the evidence an appellate tribunal can reverse the judgment even though the evidence may have been in conflict. (*Whitlock* v. *Whitlock,* 268 Ill. 218; *Johnston* v. *Sochurek,* 104 Ill. App. 350, 352). And it well established that a judgment that is against the weight of the evidence must be reversed. (*Western Union Cold Storage Co.* v. *Warner,* 78 Ill. App. 577.)

While it is true that in a civil case the plaintiff must prove his case by the greater weight of the evidence (124 A. L. R. 1380) rather than beyond a reasonable doubt (as in a criminal case), yet the proof in this type of case must be clear and convincing even though the rules of evidence applicable to a criminal case do not prevail (*Drezner* v. *Civil Service Commission,* 398 Ill. 219, 227). In other words, while the plaintiff must prove his case by a greater weight of the evidence it must be evidence that is free from doubt, is clear, and is convincing or, as is stated in an old case, *Sprague* v. *Dodge,* 48 Ill. 142, 144, the presumption of innocence is to be indulged until guilt is proved and that this presumption should yield "only to satisfactory evidence."

The number of witnesses testifying to a fact may be considered in determining the weight of the evidence. And where impartial witnesses testify to a fact their testimony carries more weight than that of the parties. As a matter of fact, where the witnesses stand on a equal plane the number of witnesses is one of controlling influence. [*Hanley* v. *Chicago City Ry. Co.,* 180 Ill. App. 397, 402-403; *The Dale,* 46 F. 670 (D. C. E. D. N. Y.).]

Furthermore, there is a strong distinction between the weight to be given to the testimony of a disinterested witness and that of a party litigant. (*Podulski* v. *Stone,* 186 Ill. 540; *Kelly* v. *Kinsella,* 162 Ill. 516; *Haycroft* v. *Davis,* 49 Ill. 455; *Linehan* v. *Morton,* 221 Ill. App. 70.) And the testimony of an impartial witness cannot be rejected without sufficient cause. (*Norguet* v. *Paramount Worsted Mills,* 177 F. 970; *The Charles F. Jeffrey,* 55 F. 685 (C. A. 1st); *Roth Office Equipment Co.* v. *Gallagher,* 172 F. 2d 452 (C. A. 6).

In the instant case there was no charge that the janitor and his wife were prejudiced; no attempt was made to impeach them; and there is no reason at all for rejecting their testimony. The court below failed to consider the testimony of these two impartial witnesses apparently under the misapprehension that it could not weigh the evidence. This was clear error because Rule 52(a) was not designed to change the rule approved by this court in *Quock Ting* v. *United States,* 140 U. S. 417, 421.

It is submitted that in view of the fact that the testimony of the janitor and his wife has not been impeached and there is nothing in the record that reflects unfavorably upon their credibility, their testimony must be taken as true. (*C. & O. Ry. Co.* v. *Martin,* 283 U. S. 209, 216.)

There are numerous cases announcing the general rule that even where the evidence is in conflict the testimony of impartial and unimpeached witnesses is controlling, especially where they predominate in number. [*Davis* v. *Philadelphia Rapid Transit Co.,* 228 Pa. 176, 178; *Norguet* v. *Paramount Worsted Mills,* 177 F. 970 (C. C., R. I.); *Haycroft* v. *Davis,* 49 Ill. 455, 456; *Kelly* v. *Kinsella,* 162 Ill. 516, 520-521; *Hanley* v. *Chicago City Ry. Co.,* 180 Ill. App. 397, 402-403; *The Dale,* 46 F. 670 (D. C., E. D. N. Y.).]

It is clear that the judgment entered in this case is against the manifest weight of the evidence.

IV.

Evidence of General Conduct or Custom Is Not Admissible in Evidence, But If Admitted the Trial Court Must Consider Evidence of Specific Conduct in Rebuttal.

At the trial the plaintiff presented the testimony of his wife (T. 68) and a Mr. Kahn (T. 75) relative to alleged conversations had in connection with the renting of another apartment in the same building. All this testimony of Mr. Kahn was approximately nine months before the incident in question here; and the testimony of Mr. West relative to the other apartment was about nine months after the incident in question here. The testimony was unquestionably offered to prejudice the trial court against the defendant, because the trial court at the outset of the trial said he was not interested in what occurred in other apartments. (T. 38.) But the plaintiff continued to refer to the other apartment on the ground that he was trying to show a plan of action on the part of the defendant always to ask for a "bonus" when renting an apartment. (T. 75.) On rebuttal the defendant sought to have seven tenants who moved into the building since rent control testify that when they rented their apartments they paid no bonus and none was asked of them. (T. 79.) This evidence was not admitted.

Plaintiff bases his right to introduce such evidence on a general rule set forth in Wigmore on Evidence, Vol. 2, p. 310, sec. 777 (3rd ed., 1940). This general rule is subject to certain restrictions, which are discussed by the same author on page 305 of the same work; namely, the incidents must be numerous enough to create an inference of systematic conduct, and must be under substantially similar circumstances so that it can be accounted for as a system only and not as a casual occurrence. At most there

are only three incidents in this case upon which the plaintiff sought to establish the alleged plan of action; they were many months apart; and there is no indication that they were under similar circumstances.

An analysis of some of he decisions cited by Wigmore (p. 310) will help in understanding this rule. In *C. C. C. & St. Louis Ry. Co.* v. *Jenkins,* 174 Ill. 398, 407, the court held that the discharge of one employee under certain circumstances did not establish a habit of discharging all employees. In *Stephens* v. *Collison,* 330 Ill. 48, 56, Wigmore states that proof that deeds were executed to other children did not prove that the grantor made a deed to the child in question. In the court below the respondent here relied on *Firlotte* v. *Jessee,* 76 Cal. App. 2d 207, where the court permitted evidence that one of the parties had offered the *same land* at about the *same time* for the *same price* without the claimed reservation. In the later case of *Lande* v. *Southern California Freight Lines,* 85 Cal. App. 2d 416, 422, the court refused to consider evidence of contracts entered into with others on the question of interpretation of the contracts. These cases, and the statement of Wigmore on page 305 of his great work, clearly show that the evidence introduced by the plaintiff was not admissible.

Once the evidence was admitted, however, the court should have permitted the evidence offered by the defendand of the five tenants who had rented apartments since rent control who were ready to testify that when they rented their respective apartments no "bonus" was received or asked by the defendant. The plaintiff objected to this evidence and was sustained by the trial court. Surely the old adage "actions speak louder than words" must still have some merit. There can be no doubt once evidence of an alleged custom or plan of action is considered the court should hear the evidence of actual occur-

rences of a same nature by one of the parties with tenants in the same building. Yet the court below could not agree on the announcement of a general rule in this regard on the application of these rules to the instant case.

V.

A Deposition Cannot Be Considered Unless in Compliance With the Federal Rules of Civil Procedure.

At the trial the plaintiff offered in evidence the deposition of a witness; the defendant objected on the ground that there was a failure to comply with three requirements prescribed by the Federal Rules of Civil Procedure (R. 115): (1) the address of the witness was not stated in the notice, (2) there was no notice given of the filing of the document, and (3) the notary taking the deposition did not certify to its correctness. The court below held that the consideration of the deposition was harmless error.

The applicable portion of Rule 30 relating to depositions reads as follows:

> "(a) * * * The notice shall state * * * the name and address of each person to be examined.
>
> * * * * *
>
> "(f) The officer shall certify on the deposition * * * that the deposition is a true record of the testimony given by the witness. * * *
>
> * * * * *
>
> "(3) The party taking the deposition shall give prompt notice of its filing to all other parties."

The deposition considered by the trial court did not have the address of the witness nor any explanation why it was omitted or a description of the witness so that she could be identified (T. 115-116); no notice of the filing of the document was given; and the notary did not certify to its correctness.

The purpose of the requirement that the address of the witness be given is that the other party may investigate and prepare his cross-examination. This was prevented by a complete absence of any address of the witness.

The purpose of the requirement that notice be given of the filing is that the other party may examine the document and if it is incorrect take steps to have it corrected, or to move to quash the deposition if not taken in compliance with the rules. No opportunity to do this was afforded the defendant because of a failure to give such notice.

The reason for requiring a certification of the correctness of the deposition is apparent. A failure to so certify creates the inference that it is not correct; and if not correct it should not be considered.

The rule regarding harmless error cannot be the harbor for the disregard of specific provisions of the Rules of Civil Procedure. Read together the law is that there must be a substantial compliance with each provision of the rules. In other words, for example, if there had been a slight discrepancy in the address the other party could not be heard to complain because on due investigation he would have received the correct address and conducted his investigation and prepared to investigate the witness. Clearly Rule 61 cannot be used to deprive a person of a substantial right; this was done when there was a complete disregard of three provisions of the Rules. And it is not seen how a failure to certify to the correctness of the deposition can be considered not substantial, or harmless error, especially when a party has had no notice of the filing of the deposition.

Conclusion.

A comparison of the wording of the original price control act and the language of the Act, as amended and extended, clearly shows that it was the intention of the Congress to withdraw from the district courts the power to hear treble damage cases under the price control act unless coming within the provisions of the general statute conferring power on these courts. In view of the large number of cases of this kind that are being filed in district courts, and because of the lack of uniformity in the decisions on this question in different parts of the country, this case presents a question of such importance that it should be reviewed and determined by this Court to the end that the federal law may be applied uniformly throughout the land. This is particularly true when it appears that the court below (and the prior cases in the same Circuit) are in error on this point.

The additional questions presented are substantial and have established a precedent that will lead other courts into the erroneous conduct of trials.

Wherefore, petitioner respectfully prays that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit commanding said court to certify and send to this Court, for its review and determination, a full and complete transcript of the record and all proceedings in the case on its docket as No. 10,000, and that said judgment and decision of said United States Court of Appeals be reversed.

Dated: August 1, 1950.

R. Leo Schwarz,
Petitioner,

By: Alphonse Cerza,
Donald C. Lundquist,
Attorneys for Petitioner.

SEP 11 1950

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 239.

R. LEO SCHWARZ,

Petitioner,

vs.

VICTOR WEST,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

MEYER J. MYER,
EDWARD A. GORENSTEIN,
Counsel for Respondent.

September 8, 1950.

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Opinions Below.

The District Court did not render a formal opinion but made Findings of Fact and Conclusions of Law which appear at pages 154-157 of the Record.

The unanimous opinion of the Court of Appeals For The Seventh Circuit (R. 175-179) is reported at 182 F. 2d (adv. op.) 721.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

1. Whether the district court had jurisdiction to hear a suit filed therein by Respondent to recover $6,000 for rent received from him by Petitioner in excess of the legal maximum rent, in violation of the Housing and Rent Act of 1947.

The following questions are suggested by Petitioner, not for the purpose of inducing the issuance of the Writ of Certiorari, as he says, but for consideration in the event that the writ should issue. Those questions are:

(a) Whether, in view of Rule 52(a) of the Federal Rules of Civil Procedure, the Court of Appeals was required to weigh conflicting oral testimony to ascertain whether the Findings of Fact were supported by the manifest weight of the evidence and whether Respondent had met the burden of proof, or whether, on the contrary, it was sufficient for the Court of Appeals to determine that the Findings of Fact were amply supported by substantial evidence and that there was "no basis whatever for holding that they were clearly erroneous."

(b) Whether the trial court committed reversible error in excluding testimony that Petitioner had rented other apartments without demanding a "bonus" after having admitted testimony that he had demanded a "bonus" for another apartment in the same building, since, as the court below found, there was substantial and ample evidence to support the Findings of Fact, even without regard to the latter testimony.

(c) Whether certain harmless omissions to comply strictly with a few technical requirements for the taking of a deposition should be grounds for review and reversal.

STATUTES INVOLVED.

The statutes involved are the following:

28 USCA, Sec. 1331:

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

50 USCA App., Sec. 1895, (herein referred to as the Housing and Rent Act of 1947):

> SEC. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment, for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of (1) $50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: *Provided,* That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the

bringing of action shall be deemed to constitute one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted, or received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section in any other action against the same defendant on account of any violation with respect to the same plaintiff prior to the institution of the action in which such judgment was rendered.

STATEMENT.

With respect to the question of the jurisdiction of the district court over the subject matter—which is the sole point advanced by Petitioner for issuance of the writ—his statement is essentially corect, except that it omits the very important fact that the amount Respondent sought to recover by his complaint was $6,000, that is, three times the sum of $2,000 which he alleged Petitioner had received from him in excess of the maximum legal rent.

Although Petitioner's statement, with respect to the additional questions which are not urged as grounds for issuance of the writ, is not entirely accurate, since we feel that these matters are not of sufficient importance to justify review, we shall not submit any additional statement regarding them.

ARGUMENT.

The issue here is an extremely simple one. The trial was narrowed to a determination of whether or not Petitioner had exacted a so-called bonus of $2,000 from Respondent as a condition of renting him an apartment (R. 34). Diametrically contradictory oral testimony was introduced by both sides. The trial judge, availing himself of the opportunity to see the witnesses and "get the feel of the case" and thus to judge the credibility of the witnesses, believed the Respondent and his witnesses and entered findings and judgment for him for $6,000—three times the amount of the overcharge—plus $500 attorneys' fees. On appeal the court below affirmed, saying (R. 178):

> "As many other appellants have done heretofore, defendant has misconceived the functions of this court, the jurisdiction of which is appellate. We must repeat once more that this court may not and will not retry issues of fact, or substitute its judgment with respect to such issues for that of the trial court. At the risk of giving the impression of weighing the evidence, we have cited in considerable detail testimony given at the trial. Usually it is sufficient to mention briefly the credible evidence which supports the trial court's findings. We have sought here to demonstrate the futility of basing hopes for a successful appeal by ignoring the provisions of Rule 52(a), Federal Rules of Civil Procedure. Of course this court in the case at bar has no alternative but to find that substantial evidence supports the trial court's findings and that there is no basis whatsoever for holding that they are clearly erroneous."

The unmistakable import of this language is that there was no basis for the appeal.

Now Petitioner has re-asserted most of the points he raised unsuccessfully in the court below, but not as reasons why certiorari should be granted, for that would be straining matters too much, but rather as points to be raised in the event that the writ should issue. As the single ground for issuing the writ he raises the question of the district court's jurisdiction over the subject matter. But his entire argument on this point rests on a non-existent base. He claims a conflict where none exists, for the conflict he asserts involves suits where jurisdiction can depend only on the provisions of the Housing and Rent Act of 1947 (50 U. S. C. A. App. § 1895) because less than $3,000 is involved, whereas in the case at bar, there being more than $3,000 involved and the suit being one arising under a law of the United States, jurisdiction derives from Sec. 1331 of the Judicial Code, and the Housing and Rent Act of 1947 need not be looked to for jurisdiction. Thus there being no conflict, the sole reason for requesting the writ vanishes.

I.

THERE IS NO CONFLICT WITH RESPECT TO THE QUESTION HERE INVOLVED.

Petitioner points to a conflict between the Third Circuit in *Fields* v. *Washington,* 173 F. 2d 701 (1949), and the Seventh Circuit in *Adler* v. *Northern Hotel Co.,* 175 F. 2d 619 (1949), and argues that since the court below cited the *Adler* case as authority for its holding, therefore, the decision in the case is in conflict with the holding of the Third Circuit in the *Fields* case. However, the facts in the instant case are so importantly different from those in both the *Adler* and *Fields* cases that they do not even touch the area of the conflict.

In both the *Adler* and *Fields* cases the amounts in con-

troversy were less than $3,000 and both decisions were predicated on that fact. In the *Fields* case the court said (p. 702):

> "We agree that the district court was without jurisdiction because the matter in controversy did not exceed the sum of $3,000, exclusive of interest and costs, * * *"

and the court continued (p. 703):

> "It is obvious that although the present suit arises under a law of the United States, the Housing and Rent Act of 1947, the district court was not empowered to entertain it under Section 1331 (of the Judicial Code) since the sum claimed by the plaintiff is far less than $3,000."

Similarly, in the *Adler* case the claim of each plaintiff was less than $3,000 and the motion of defendants to dismiss for want of jurisdiction was based on that fact (175 F. 2d 619, 620).

The reasoning of both cases was that since the amounts in controversy were less than $3,000, jurisdiction could not be based on Section 1331 of the Judicial Code and therefore, had to be based on Section 205 of the Housing and Rent Act of 1947 (50 USCA App., Sec. 1895). In the case at bar, however, the amount in controversy exceeds $3,000,[1] exclusive of interest and costs, and since it involves a federal question, jurisdiction is founded on Section 1331 of the Judicial Code.

Petitioner points to a number of cases in the district courts as proof of the asserted conflict (Petitioner's Brief,

[1] The amount sought to be recovered by the complaint was $6,000, being three times the amount by which the rent received by Petitioner exceeded the lawful maximum (R. 3). It is well settled that the amount of both the actual and so-called punitive damages—in this case $6,000—measures the amount in controversy *Bell* v. *Preferred Life Assurance Society,* 320 U. S. 238 (1943), rather than the amount of the actual overcharge, as Petitioner argued in both courts below.

p. 8). However, in none of those cases could jurisdiction be founded on Section 1331 of the Judicial Code for the amount in controversy was less than $3,000, as it can be in the case at bar. And in each of those cases jurisdiction could only be founded on the Housing and Rent Act of 1947, and the attack on the jurisdiction was based on the lack of $3,000 involved.

In the Third Circuit where the *Fields* case is the law, the district court in *Frisch* v. *Lopez,* 87 F. Supp. 544 (D. C. E. D. Pa.), cited by Petitioner in his brief, p. 8, indicated that it clearly understood the *Fields* case to hold that it has "no jurisdiction over actions brought under the latter Act [Housing and Rent Act of 1947] if the amount in controversy does not exceed $3,000." The language used by every one of the judges in the cases cited by Petitioner indicates beyond doubt that they understood the *Fields* and the *Adler* decisions as pertaining only to cases where the amount in controversy is less than $3,000 and that if the amount in controversy exceeds that sum, jurisdiction exists under Section 1331 of the Judicial Code. See *McCrae* v. *Johnson,* 84 F. Supp. 220, 222 (D. C. Md. 1949) and *Temmerman* v. *Scafidi,* 88 F. Supp. 527, 528 (D. C. N. D. Cal. S. D. 1950).

It is noteworthy that in the case which Petitioner points to as indicating the "confusion" on the question, namely *Aram* v. *Hazelwood Apartments Co.,* 89 F. Supp. 836 (D. C. E. D. Mich. S. D. 1950), the amount in controversy was only $570.

Petitioner argues that the fundamental rule announced by the cases following the *Fields* decision is that the 1947 Act did not of itself confer jurisdiction on the district courts; otherwise, he says, it would not be necessary to discuss the amount involved. This argument appears to misapprehend completely the reasoning of those cases. It

is precisely because the amount involved in those cases was less than $3,000 that reliance could not be had on Section 1331 of the Judicial Code, and jurisdiction had to be found, if at all, in the Housing and Rent Act of 1947.

It is, therefore, clear that although a conflict exists between the Third and Seventh Circuits as to the construction of the Housing and Rent Act of 1947, this conflict is limited to cases involving less than $3,000; but where, as in the instant case, the amount in controversy exceeds $3,000, it is not necessary to base jurisdiction on, or to construe, that Act, for in such case, jurisdiction is completely rested on Section 1331 of the Judicial Code. We, therefore, submit that the asserted conflict does not exist with respect to the decision in this case.

II.

THE DECISION BELOW IS CLEARLY CORRECT.

Although the court below cited *Adler* v. *Northern Hotel Co.*, 175 F. 2d 619, in support of its holding that the district court had jurisdiction, it was not necessary for it to do so, for jurisdiction over the subject matter existed by virtue of Section 1331 of the Judicial Code. Under that section it is necessary that the controversy involve more than $3,000, exclusive of interest and costs, and that the suit "arise[s] under the Constitution, laws or treaties of the United States."

We have already shown in point I above that the jurisdictional amount exists in this case. Petitioner, abandoning the untenable contention he advanced in the two courts below that the jurisdictional amount was absent (R. 35), now asserts that this case does not involve a federal ques-

tion, presumably meaning thereby, in the words of the statute, that this suit does not "arise under the Constitution, laws or treaties of the United States" (Petitioner's Brief, pp. 17-18). His entire treatment of this question consists of one short paragraph which is limited to a reiteration of the general language often found in many cases involving the problem of what is a federal question, but which language, because of its generality, is not very helpful in deciding particular cases. He cites two cases, *Shulthis* v. *McDougal,* 225 U. S. 561 (1912), and *First National Bank* v. *Williams,* 252 U. S. 504 (1920), neither of which is in point here, for neither is a suit brought to recover on a cause of action created by a federal statute, as is the case at bar.

The complaint in the instant case alleges a cause of action which is unknown at common law and non-existent under state law and which exists only by virtue of an act of Congress, namely, the Housing and Rent Act of 1947 (R. 2). Under these circumstances, it can hardly be denied that the suit arises "under a law of the United States." As stated in *Bell* v. *Hood,* 327 U. S. 678, 681 (1946),

> "* * * where the complaint as here is so drawn as to seek recovery directly under the Constitution or the laws of the United States, the federal court * * * must entertain the suit."

And although jurisdiction was found lacking in *Gully* v. *First National Bank in Meridian,* 299 U. S. 109 (1936), the rationale of that decision with respect to the test of a federal question easily encompasses the facts in the case at bar. The court there said (p. 114):

> "* * * today, even more clearly than in the past, 'the federal nature of the right to be established is decisive—not the source of the authority to establish it.'"

It hardly seems necessary to argue that the case at bar arises under a law of the United States. In fact, the very language used by Petitioner in his brief supports this contention. He admits that a federal question exists when there is a controversy regarding the validity, construction or *effect* of a law of the United States (Petitioner's Brief, p. 18). Certainly this case, at the very least, involves a dispute as to the effect of the Housing and Rent Act of 1947 on Respondent's right to recover from Petitioner.

Significantly, three of the cases cited by Petitioner recognize the fact that suits such as this one, brought to recover overcharges under the Housing and Rent Act of 1947, arise under a law of the United States. In *Fields* v. *Washington*, 173 F. 2d 701 (1949), the court said (p. 703):

> "It is obvious that although the present suit arises under a law of the United States, the Housing and Rent Act of 1947, the district court was not empowered to entertain it under Section 1331 since the sum claimed by the plaintiff is far less than $3,000."

In *Temmerman* v. *Scafidi*, 88 F. Supp. 527 (D. C. N. D. Cal. S. D. 1950), the court held, in reliance on the *Fields* case, that it did not have jurisdiction under Section 1331 of the Judicial Code if the amount in controversy exceeded $3,000; and in *McCrae* v. *Johnson*, 84 F. Supp. 220 (D. C. Md. 1949), where the court also denied jurisdiction in a suit involving $429, on the authority of the *Fields* case, the court, nevertheless, said (p. 222):

> "Section 1331 confers jurisdiction on the district courts in all cases arising under the Constitution, laws or treaties of the United States (which, of course, includes the instant case)."

Petitioner may urge that, since the trial of the case resolved itself into a question of fact as to whether or not Petitioner had received the "bonus" of $2,000 from Re-

spondent, therefore no federal question existed. However, jurisdiction must be tested only by the allegations of the complaint, *Gully* v. *First National Bank in Meridian,* 299 U. S. 109 (1936), and not by the issues at the trial. Reading the complaint, this case might have involved the question of the constitutionality of the statute; the construction of the Act, for instance, whether a so-called bonus came within the meaning of the word "rent" as used in the Act; the construction and interpretation of the regulations and orders issued by the Housing Expediter fixing the maximum legal rents for the apartment in question;[1] and many other questions. When the complaint was filed, these were all definite possibilities and the fact that none of them became a reality is of no significance.

Clearly this suit to recover damages for violation of a federal statute is a suit arising under a law of the United States and since the amount in controversy exceeds $3,000, the jurisdiction of the district court under Section 1331 of the Judicial Code is established.

CONCLUSION.

We submit that we have shown that the sole reason advanced by Petitioner for granting the writ is without foundation and the writ should, therefore, be denied. Petitioner, however, specifies certain claimed errors, not as grounds for the issuance of the writ, but as matters to be taken into consideration in the event that the writ should be granted. In our opinion, these matters are so inconsequential that they do not qualify as proper matters for review on certiorari. We do not mean by this that either

[1] That regulations have the force of law, see *Standard Oil Co.* v. *Johnson,* 316 U. S. 481 (1942); *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935), as do provisions of a bill of lading adopted by the Interstate Commerce Commission, *Illinois Steel Co.* v. *B. & O. R. R. Co.,* 320 U. S. 508 (1944).

of the courts below erred with respect to these matters, for in our opinion no error was committed. However, we do not think that this court will grant review in order to weigh evidence or consider assignments of error which are super-technical in character and by which the Petitioner at worst was in no way prejudiced, as the court below pointed out in its opinion (R. 178-179). This case in itself is not of such enormous importance as to justify such review, nor do the matters suggested by Petitioner raise important questions of federal law.

For the reasons stated, we respectfully submit that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent.

September 8, 1950.

SEP 28 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 239

R. LEO SCHWARZ,
Petitioner,

vs.

VICTOR WEST,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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Respondent's Brief in Opposition further illustrates the confusion that exists relative to the jurisdictional question presented in this case. Reply is made to the pertinent points only.

I.

(Reply to Respondent's Point I, pp. 6-9.)

Although respondent in his complaint (T. 2) stated that jurisdiction to hear the case was granted to the district court by section 205 of the Housing and Rent Act of 1947, he now urges that Section 1331 of the Judicial Code and the said Rent Act granted jurisdiction. (Brief, p. 6.)

A reading of the *Adler* case and the *Fields* case will readily show that a conflict, in fact, does exist. In the *Fields* case the court, in the first paragraph of its opinion, states that the suit is filed under section 205 of the Rent Act; in the second paragraph section 205 is set out; in the third paragraph the court holds that the Rent Act does not confer jurisdiction on the district court to hear a treble damage case under the Act; and observes that it must look elsewhere; the court then considers the provision of the Judicial Code and concludes that the district court had no jurisdiction to hear the case because the requisite jurisdictional amount was not involved. The court clearly held that the Rent Act did not grant jurisdiction to the district court to hear the case. In the *Adler* case the court states that there were numerous plaintiffs but that none of their claims exceeded the jurisdictional amount; the aggregate of their claims did exceed this amount, however; the majority opinion held that the Rent Act did grant jurisdiction, while the dissenting opinion of Justice Minton held that no jurisdiction was granted the district court; because of this conclusion of the majority there was no need to consider whether the requisite jurisdictional amount existed or whether there was a federal question involved in the case. Respondent is in error when he says (Brief, p. 8) that both cases were based on the reason that less than $3,000.00 was involved because the *Adler* case did not consider the Judicial Code provision. It is submitted that if the Rent Act grants jurisdiction the amount involved is not material.

Furthermore, if the courts are in hopeless confusion in their interpretation of the *Adler* and *Fields* cases (as indicated by Respondent's Brief, pp. 8-9), there is need for this court to clarify the matter in the exercise of its power of supervision over Federal courts.

There can be no question that there is a conflict in the

cases as to whether the Rent Act does grant to the district courts jurisdiction to hear treble damage cases. The consideration of the Judicial Code becomes necessary after the determination is made that the Rent Act does not grant jurisdiction. The respondent when he filed his complaint rested his jurisdictional statement on the short sentence: "Jurisdiction of this action is conferred upon this court by Section 205 of said Rent Act." (T. 2.) The complaint had no other allegation that expressly or inferentially related to the matter of jurisdiction. The *Fields* and *Adler* cases are clearly in direct conflict as to whether this statute grants jurisdiction to the district court.

II.

(Reply to Respondent's Point II, pp. 9-12.)

Respondent's argument in support of the decision below in holding that the trial court had jurisdiction is based on one point: that the filing of a suit to enforce a cause of action created by an Act of Congress by necessity, is a case under the laws of the United States. In support of this view Respondent quotes from a number of decisions involving the Rent Act (Respondent's Brief, p. 11) but fails to observe that in none of those cases did the parties urge that the suit did not arise under the Constitution, laws or treaties of the United States and consequently the statements of the court are dictum. It is significant that while Respondent finds fault (Brief, p. 10) with the "generality" of the language of certain cases cited by Petitioner, that the Respondent was unable to cite one case supporting his contention that the mere creation of a cause of action by Act of Congress grants jurisdiction to the district court to hear the case. In urging this view on the court the Respondent overlooks the well established rules of law that when Congress creates a new cause of action

it may also provide the remedy and that remedy is exclusive.

The two cases cited by Respondent (p. 10) in support of his contention that the creation of the cause of action by Congress makes this case one "under a law of the United States" do not support this view. *Bell* v. *Hood*, 327 U. S. 678 and *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, were not cases based on causes of action created by Congress. The *Bell* case involved the question "whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers" (327 U. S. 678, 684); the *Gully* case was a suit to recover taxes; this court in holding that the district court had no jurisdiction relied, in part on the *Shulthis* case by quoting from this cause (299 U. S. 109, 114) and then saying: "not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." The quotation at the bottom of page 10 of Respondent's Brief is from *Puerto Rico* v. *Russell Co.*, 288 U. S. 476, which held that the district court did not have jurisdiction to hear the case merely because the bank had been organized under a Federal charter.

This court in *Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 199, observed that plaintiffs (pp. 202-203) "claim the right to this use under the provisions of certain specified acts of Congress," and then held that a Federal court does not have jurisdiction unless the right sought to be protected depends upon the construction or effect of the Constitution or law of the United States.

In *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, this court considered the question whether a suit brought under a cause of action created by a Federal statute (the mining law which permitted "adverse suits" under the act to be filed "in any court of competent jurisdiction") of itself conferred jurisdiction on Federal courts; this court held

(p. 507) "that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses." This court observed (p. 509) that a case that presents a mere question of fact does not necessarily create a Federal question.

Respondent's strained contention (Brief, p. 12) that "this case might have involved" a federal question is untenable. It is not enough that the constitutionality of a statute or that its construction "might" be involved, but these questions must really exist. This court in *Newburyport Water Co.* v. *Newburyport,* 193 U. S. 561, 576 said that "jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears that such averment is not real and substantial, but is without color of merit." The matters relating to jurisdiction must clearly appear, and it is not sufficient that jurisdiction may be inferred argumentatively (*Hanford* v. *Davies,* 163 U. S. 273, 279-280). Nor can the district court retain jurisdiction in order to ascertain whether a federal question will eventually develop in the suit (*Florida Central & Peninsular Railroad Co.* v. *Bell,* 176 U. S. 321, 327-328). In *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 505, this court held that the mere fact that a suit was filed pursuant to the Mining Act passed by Congress did not confer jurisdiction on the Federal Courts to bear the case. And in *Cuyahoga Co.* v. *Northern Ohio Co.,* 252 U. S. 388, 397 this court observed that a federal question must be not a matter of form but substantial, not a mere assertion but must exist in essence and effect. And in *Marshall* v. *Desert Properties Co.,* 103 F. 2d 551, cert. denied 308 U. S. 563, the court stated (pp. 552-553):

> "Where there is no dispute between the parties as to the meaning of any Federal Law, *but the case in-*

> *volves merely issues of fact,* the case is not one arising under the constitution or a law or treaty of the United States, although the respective interests or titles of the parties may be derived through some constitution, law or treaty." (Italics added.)

(To the same effect see *Shoshone Mining Co.* v. *Rutter,* 177 U. S. 505, 509). In the case at bar the right or cause of action is derived from a Federal law, but only a question of fact was involved (as clearly set forth in Respondent's Brief, p. 5) and therefore no Federal question was involved.

Conclusion.

In view of the confliction that exists in the cases on the question presented there is a need for a clarification by this court. With the numerous cases still pending and the number that will undoubtedly be filed in the future there should be a final determination of the question by this court to the end that litigants and the trial courts may guide themselves accordingly.

Respectfully submitted,

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